

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local)	
Exchange Carriers)	

COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance (“RICA”) submits these Comments in response to the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”), FCC 03-36, 68 Fed. Reg. 52307 (2003), *deadline extended*, Public Notice, DA 03-2979 (Sept. 26, 2003), in the above-captioned matter.

RICA urges the Commission to retain the current “pick and choose” rule because it best protects and promotes competition and competitors, follows statutory dictates, and enjoys Supreme Court endorsement. Should the Commission opt to modify the rule as proposed, RICA respectfully submits that the Commission should apply such a rule to future, or modified existing Statements of Generally Available Terms (“SGATs”) only. In either case, the Commission should first elaborate rules to guide states in a review of whether an SGAT, in light of the absence of “pick and choose,” sufficiently protects competition and the ability of CLECs to negotiate interconnection agreements with the Regional Bell Operating Company (“RBOC”). Consistent with the Communications Act, any new rule that effectively supplants “pick and choose” with SGATs should not extend the SGAT option to non-RBOC incumbents.

I. BACKGROUND; INTEREST OF RICA

RICA is a national association of more than eighty small, rural competitive local exchange carriers (“CLECs”) affiliated with independent incumbent LECs. Despite their size, RICA members have brought, principally through the deployment of their own facilities, modern and advanced telecommunications and information services to rural areas long neglected by large incumbent local exchange carriers (“ILECs”). RICA CLECs interconnect with the significantly larger ILECs, including the RBOCs, against which they compete. RICA members desire to continue to invest in technology to expand these public benefits under rational regulatory policies.

Because of their small size, RICA members experience a substantial negotiating disadvantage with respect to their large ILEC competitors. The benefits of competition that the Telecommunications Act of 1996 seeks to promote cannot be realized where interconnecting carriers have widely divergent negotiating prospects simply because of their size. RICA members desire, therefore, that the FCC promulgate interconnection rules and polices that help maintain, to the extent possible, a level interconnection negotiation playing field. The current “pick and choose” rule, 47 C.F.R. § 51.809, is such a rule.

II. THE COMMISSION SHOULD MAINTAIN THE CURRENT “PICK AND CHOOSE” RULE.

The Commission should maintain the current “pick and choose” rule. The current rule best protects and promotes competition. It has been an integral component of Commission interconnection policy since 1996, it closely tracks statutory language and intent, and it enjoys Supreme Court endorsement.

The current rule promotes competition. It especially protects small carriers that suffer negotiating disadvantages because of their size, a concern the Commission recognized in 1996.¹ RICA members are small carriers. They operate hundreds or, at most, a few thousand access lines. While most RICA members are facilities-based, a minority of RICA members purchase unbundled network elements (“UNEs”) from the competing ILEC. Further, as small businesses, RICA members have few resources to devote to negotiating interconnection agreements. Accordingly, RICA members have little power to negotiate favorable interconnection agreements with their monolithic competitors.

The existence of the current “pick and choose” rule allows rural CLECs the opportunity to obtain interconnection and UNEs at rates available to other CLECs. It guarantees that the large ILEC’s best available offer is available as well to rural CLECs. Absent the directive of the “pick and choose” rule, RICA believes that the large ILECs would not make available to small rural CLECs “any interconnection, service, or network

¹ In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325, 11 FCC Rcd 15499, ¶ 1313 (1996) (“First Report and Order”).

element,” 47 U.S.C. § 252(i), as the Act requires, at the same rates and terms available to CLECs with negotiating power.²

The rule as it now stands closely tracks the statutory language at 47 U.S.C. § 252(i). As the Commission indicated in its First Report and Order, interpreting § 252(i) to not allow access to “any interconnection, service, or network element” (quoting the Act) would vitiate parts of the Act, run contrary to Congressional intent, and “appear to eviscerate the obligation Congress imposed in section 252(i).”³

The rule change proposed in the FNPRM turns the Commission’s 1996 concern on its head. The proposed change would undo Congressional intent and fly in the face of statutory text. Congress enacted sections 252(i) (“pick and choose”) and 252(f) (SGATs) as two independent means of guaranteeing access to incumbent LEC networks. The FNPRM proposes restricting the current availability to CLECs of the protections found in both sections 252(i) and 252(f) to the availability of the protections found in sections 252(i) or 252(f) (to the extent they even exist in section 252(f), as described below). The Commission simply may not rewrite the Act by rewriting the rules.

Adding to the strength of the current rule is Supreme Court precedent. The Court overturned a contrary holding of the U.S. Court of Appeals for the Eighth Circuit and endorsed the “pick and choose” rule.⁴ The Court found that the rule tracked the related statutory language “almost exactly,” and is the “most readily apparent” interpretation of the Act.⁵ True enough, the Court went on in dicta to say that determining whether the “pick and choose” rule would impede negotiations was “eminently” within the

² It is telling that principally the RBOCs and only one CLEC—a sizable one—are advancing severe limitations, if not an end, to “pick and choose.”

³ First Report and Order at ¶¶ 1310-12.

⁴ AT&T v. Iowa Utilities Board, 525 U.S. 366 (1998) (“IUB”).

⁵ IUB at 396.

Commission's jurisdiction. That dicta does not mean, however, that a radical change in the rule of the kind the Commission contemplates would withstand judicial scrutiny.

The Commission cites the Court's remark approvingly in its FNPRM tentatively advancing a wholesale change in the rule.⁶ It is not at all clear, however, that the Court so easily would have declared as much had the Commission crafted a rule not so tightly knit with the authorizing statute. Indeed, the Commission in its FNPRM seeks to "rewrite" Section 252 by allowing the protections only of subsections (i) *or* (f) rather than the protections of both. Instead of heading down this uncertain path, RICA would urge the Commission to maintain the current "tried and true" rule. Should the Commission nevertheless opt to change the rule, it should place limitations on its application.

III. SHOULD THE COMMISSION MODIFY THE "PICK AND CHOOSE" RULE AS PROPOSED, IT SHOULD APPLY THE CHANGED RULE ONLY TO EITHER FUTURE SGATs OR CURRENT SGATs AFTER REVIEW, AND ONLY TO THE SGATs OF THE RBOCs.

If the Commission opts to restrict "pick and choose" as described in the FNPRM, it should do so only with respect to future SGATs. As indicated above, Congress enacted each statutory provision, sections 252(i) and 252(f), to guarantee competitors access to the networks of incumbent LECs. Section 252(f), however, which provides for the optional path of filing SGATs with state commissions, applies only to the RBOCs. SGATs are, by the terms of the Act, voluntary. At that, all an RBOC's SGAT must do is comply with the general interconnection obligations found in section 251 and 252. A state commission need not ensure that an SGAT provide any additional protections to interconnecting carriers.

⁶ FNPRM at ¶ 721.

It is important to note that these voluntarily filed SGATs do not derive from negotiations between the RBOCs and interconnecting carriers. Accordingly, the RBOC is under no obligation or compunction (unless the state commission imposes separate state requirements) to include terms in its SGAT other than the bare minimum required by sections 251 and 252. As a result, SGATs are little more than a bottom floor from which carriers that desire to interconnect with an RBOC may attempt to bargain up.

In any event, because both sections 252(f) *and* 252(i) have been valid law since 1996, not a single existing SGAT was created with a mind toward supplanting the “pick and choose” rule, as the FNPRM would have SGATs now do. Accordingly, it would be patently unfair, if not illegal, to allow existing SGATs in their current forms to be allowed to supplant the “pick and choose” rule.

To the extent the Commission permits SGATs to supplant “pick and choose,” it should do only with respect to future SGATs. In the alternative, the Commission may consider allowing current SGATs to supplant “pick and choose” only after a comprehensive state commission review to determine whether any individual SGAT is up to the task. In either case, the Commission will want to initiate a proceeding to elaborate standards aimed at producing SGATs capable of supplanting the current “pick and choose” rule.

Further, should the Commission decide to enact a new “SGAT or ‘pick and choose’” rule, it should ensure to limit the newly restrictive rule, consistent with 47 U.S.C. § 252(f), to SGATs filed by the RBOCs. Nothing in the statute permits carriers other than RBOCs to file SGATs, and the Commission states no case for a rule modification that would rewrite the Act in this way.

IV. CONCLUSION

For the reasons set forth above, the Rural Independent Competitive Alliance urges the Commission to retain the current “pick and choose” rule, which protects and promotes competition, tracks the language of the Act, and already enjoys Supreme Court endorsement. Should the Commission opt to modify the rule as proposed, RICA respectfully submits that the Commission should apply such a rule to future SGATs only. To the extent the rule limiting “pick and choose” is applied to existing SGATs, the Commission should first order state review of such SGATs. In either case, the Commission must elaborate standard rules to determine whether any future or individual existing SGAT, in light of the absence of “pick and choose,” sufficiently protects competition and the ability of CLECs to negotiate interconnection agreements with the RBOCs. Finally, consistent with the Act, any new rule that supplants “pick and choose” with SGATs should not extend the availability of SGATs to non-RBOC incumbents.

Respectfully submitted

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